PREVIOUS

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SHORT TITLE: [McCleary, Thomas]
VERSUS [Navarro, Jose G., et ux.] DATE DOCKETED: [031392]
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	DATE	NOTE	PROCEEDINGS & ORDERS
1	Mar 13 1992	D	Petition for writ of certiorari filed.
3	Apr 24 1992		Brief of respondents Jose Navarro, et al. in opposition filed.
4	Apr 24 1992	G	Motion of respondents for leave to proceed in forma pauperis filed.
2	Apr 29 1992		DISTRIBUTED. May 15, 1992
5	May 18 1992		Motion of respondents for leave to proceed in forma pauperis GRANTED.
7	May 18 1992		REDISTRIBUTED. May 22, 1992
9	May 26 1992		REDISTRIBUTED. May 29, 1992
10	Jun 1 1992		Petition DENIED. Dissenting opinion by Justice White with whom the Chief Justice, Justice O'Connor and Justice Thomas join. (Detached opinion.)

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(1)

91-1550

Supreme Court, U.S.
FILED
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No. 91-_____

In the Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS MCCLEARY,

Petitioner,

V.

JOSE G. NAVARRO AND
ESPERANZA C. NAVARRO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WITH APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit Court of Appeals err in concluding that the issue of petitioner's defense of qualified immunity is a jury question, in light of this Court's most recent holding in *Hunter v. Bryant*, 112 S.Ct. 534 (1991) that the issue of a defendant's qualified immunity is a question of law for the court, not for the jury, when the facts are not in dispute.

2. Applying this Court's holding in *Hunter v. Bryant*, 112 S.Ct. 534 (1991), and applying the standard of objective reasonableness, was the petitioner entitled to summary judgment on his defense of qualified immunity because the record shows that a reasonable officer could have believed that the Navarros' house was the "second house on the right;" and thus, the correct house to be searched.

3. When a police officer obtains a search warrant from a judge using his own affidavit in support of the request for the warrant, and the search warrant and affidavit are valid and comply with the Fourth Amendment on their face, is the standard to be applied to the officer's defense of qualified immunity in an action where it is contended that a mistake was made in the warrant and affidavit that of objective reasonableness as set forth in *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), or that of a reckless disregard for the truth as set forth *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978).

4. Applying this Court's holding in *Hunter v. Bryant*, 112 S.Ct. 534 (1991), and applying the standard of a reckless disregard for the truth, was the petitioner entitled to summary

judgment on his defense of qualified immunity, because the record shows that petitioner's mistaken belief that the Navarro house was the "second house on the right" was not the result of his reckless disregard for the truth.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Thomas McCleary, respectfully prays that the Court issue a writ of certiorari to review the order and opinion of the Court of Appeals for the Ninth Circuit in the above-entitled case; or alternatively, reverse the decision of the Ninth Circuit, and remand the matter for the entry of a judgment in favor of petitioner.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this matter is reported as *Navarro v. Barthel*, ___ F.2d ___, 1991 WL 274040 (9th Cir. 1991), and is set forth as Appendix A in this petition. In its opinion and order, the Court of Appeals affirmed the district court's denial of petitioner's motion for summary judgment, which had been filed on the basis of qualified immunity. The unreported opinion of the district court is set forth as Appendix B in this petition.

JURISDICTION

Jurisdiction to review the Court of Appeals' order by writ of certiorari in this civil case is conferred upon this Court by 28 U.S.C. § 1254(1) and *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985). The opinion of the United States Court of Appeals for the Ninth Circuit was filed on December 27, 1991, and the order sought to be reviewed was entered on the same date.

This petition for a writ of certiorari is being filed within the 90-day period prescribed by 28 U.S.C. § 2101(c) and Rule 13 of the Court, as computed in accordance with Rule 30 of the Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved in this case is the Fourth Amendment to the United States Constitution. The federal statute authorizing civil actions for the deprivation of civil rights is 42 U.S.C. § 1983.

The Fourth Amendment to the United States Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

1. Basis of Jurisdiction in the Lower Courts.

The basis for federal jurisdiction in the United States District Court for the District of Oregon over plaintiffs' claims is 28 U.S.C. §§ 1331 and 1343(3). The basis for jurisdiction in the Court of Appeals for the Ninth Circuit is 28 U.S.C. §1291, and the collateral order doctrine. *Mitchell v. Forsyth*,

472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985).

2. Summary of Material Facts.

Prior to August 24, 1988, the date of the search of the plaintiffs' residence, the City of Medford was using a confidential reliable informant to help it enforce the criminal drug laws of the State of Oregon. (Affidavit of McCleary at 2, ER at 34) The name of the informant was Pedro Oropeza Ramirez, but the police department referred to him as Javes, in order to protect him. (Affidavit of McCleary at 2, ER at 34) Mr. Ramirez was not paid for the information he provided, and there were no charges pending against him at the time he provided the information involved in this lawsuit. (Deposition of McCleary at 13, CR 52)

Prior to August 24, 1988, Mr. Ramirez had provided the City of Medford with information about drug dealers and users, and the information he provided always turned out to be true. (Affidavit of McCleary at 2, ER at 34) The City of Medford police department considered Ramirez to be a very reliable informant. (Affidavit of McCleary at 2, ER at 34)

As to Detective McCleary's involvement with Ramirez, McCleary first met Ramirez in October 1987; and between the dates of October 1987, and the issuance of the warrant involved in this litigation, Ramirez had provided to McCleary 18 names and locations of persons involved in criminal activity in drugs, and this information was confirmed by two independent sources. (App at 25) In addition, based upon information supplied to McCleary by Ramirez, a purchase of

cocaine was made from a person that Ramirez had told McCleary was selling drugs. (App at 25)

On August 15, 1988, Tim George, another detective employed by the City of Medford Police Department, and McCleary had a conversation with Ramirez about the sale of cocaine by a person named Andres Villa. (Affidavit of George at 2, ER at 44; Deposition of McCleary at 67, CR 52) Mr. Ramirez told the detectives that Andres Villa was an "ounce at a time" dealer of cocaine at Villa's residence.

As to the location of Andres Villa's house, Mr. Ramirez told McCleary that there was a center driveway off of Agate road that served as an access road to several houses and the plant of Southern Oregon Tallow Co. Inc.; and that there were five houses located along this driveway, on the right hand side of the driveway, as you travel west towards the Tallow plant. (Affidavit of McCleary at 2,3; ER at 34, 35; App at 24) Mr. Ramirez told McCleary that Andres Villa's house was a one story, single family residence, and was the second house on the right off of this center driveway. (Affidavit of McCleary at 2, ER at 34; App at 25) Detective George heard Ramirez say that Villa's house was the second one on the right. (Affidavit of George at 2, ER at 44).

Prior to receiving the above information from Ramirez, Detective McCleary had been told by other informants that Andres Villa was "dealing coke and had coke in the house." (Deposition of McCleary at 27, CR 52) Because the above information provided by the other informants and Ramirez was not "fresh enough" to base the issuance of a warrant, McCleary did not attempt to get a warrant at that time; but he

did travel to the Southern Oregon Tallow Plant to view Villa's residence. (Deposition of McCleary at 20, 27, 28; CR 52)

Because the second house on the right fit the description given to McCleary by Ramirez, and because Ramirez told him that Villa lived in the second house on the right, McCleary had no reason to doubt that Villa lived in the second house on the right. (Deposition of McCleary at 39, 40, 41, CR 52) As stated by McCleary:

> "Best way maybe to answer that would be to say I went to the house, the location was given to me, that house was there as it was described to me and I had no reason to doubt that the people who lived in there were different from the ones that I had been told lived there." (Deposition of McCleary at 23, Lines 3-8, CR 52)

> "Q. Upon what information were you relying that led you to believe that the house in fact occupied by the Navarros was occupied by Andres Villa?
>
> A. The information from Pedro Ramirez, the description of the house from Pedro Ramirez, the entries in the police files gave the address there on . . . Agate Road. Put together with the reliability of Pedro Ramirez." (Deposition of McCleary at 23, Lines 21-25, at 24, Lines 1-4, CR 52)

After viewing the second house on the right from a vantage point on Agate Road, which was necessary because one could not drive in front of the second house on the right without creating suspicion, McCleary went to the police station to obtain a street address for the second house on the right, the one he was told was occupied by Villa. (Deposition of McCleary at 20, 30, 31; CR 52) The police records only indicated that Andres Villa lived at the Souther Oregon Tallow

Company. (Deposition of McCleary at 36, CR 52) McCleary then went to the power company to try and find a street address for the second house on the right. (Deposition of McCleary at 20, CR 52) As testified by McCleary:

> "When I went to the power company, they gave me two addresses for the tallow plant. And they said that there's no way of distinguishing which meter goes to which houses out there, that they couldn't distinguish it. So I had two addresses which I listed in the affidavit and one was 10175 and 10195 Agate Road."

Within a couple of days prior to August 24, 1988, Ramirez once again met with McCleary. At this meeting, Ramirez told McCleary that he had been at the residence of Andres Villa, and that while he was at the residence, he observed four ounces of cocaine packaged in plastic bags. (Affidavit of McCleary at 2, ER at 34)

After receiving this current information about drugs at the residence of Andres Villa, McCleary met with the Honorable Ross Davis, a Jackson County District Court Judge, in order to obtain a search warrant for the search of drugs at the residence of Andres Villa. (Affidavit of McCleary at 3, ER at 35) McCleary was placed under oath by Judge Davis, and then testified in front of Judge Davis with regards to the reliability of Ramirez, and the information Ramirez had given to him about Villa. (App at 23-29) McCleary also related to Judge Davis what Ramirez had told him about the location of Villa's house. (App at 24) The testimony of McCleary before Judge Davis has been transcribed (App at 23-29), and verified by Judge Davis as being accurate. (ER at 55).

After hearing the testimony of McCleary, Judge Davis issued a search warrant, set forth as Appendix C (App at 22), for the search of the second house on the right, believing it to be the home of Villa. The warrant was then given to Oregon State Trooper Curt Barthel for execution. (ER at 35)

McCleary had no further involvement with the matter, until the next day, when he was informed that Villa lived in the third house on the right, not the second house (Note: the warrant was amended in handwriting to read the "third house on the right" after the executing officers leaned that Villa lived next door to the plaintiffs. ER at 49, line 12).

3. Procedural History.

The plaintiffs filed their complaint on October 11, 1989. In their complaint, the plaintiffs set forth their claim against Detective McCleary in one paragraph as follows:

> "The search warrant obtained by the defendant McCleary was based upon an affidavit and sworn oral presentation so lacking in individualized fact allegations that no reasonably well-trained and competent police officer could believe said facts sufficient to support said warrant." (Paragraph 19, at 7, lines 15-19 of plaintiffs' complaint, ER at 25)

Because the above contention appeared to be an attempt by the plaintiffs to attack the warrant and sworn testimony of McCleary "on their face," as was the situation in the case of *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), as opposed to an attack of the veracity of the warrant or sworn testimony, after filing his answer, and after completing the taking of depositions, Detective McCleary filed a motion for summary judgment on the grounds of qualified immunity.

In his motion for summary judgment, Detective McCleary contended that as a matter of law, his sworn testimony before the Honorable Ross Davis, a Jackson County District Court Judge, proved that the issuance of the warrant complied with the requirements of the Fourth Amendment, in that such testimony, on its face, showed that the warrant was issued "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." McCleary then argued that since his sworn oral presentation to Judge Davis was not so lacking in individualized fact allegations as to the particular place to be searched for the drugs, it had been reasonable for him to have concluded that the warrant met all the requirements of the Fourth Amendment. Therefore, he was entitled to summary judgment.

The trial court did not take issue with the undisputed fact that the warrant and sworn testimony were valid on their face, and complied with the Fourth Amendment's requirement that a particular place for the search be described; nor did the trial court disagree that McCleary believed that everything he had told Judge Davis was the truth. (App at 11) However, instead of granting McCleary's motion for summary judgment on that basis, the trial court denied the motion, finding that there was a question of fact as to whether a reasonable police officer would have requested clarification from the informant as to the location of Villa's home. As stated by the trial court:

> "Although there is some loose language, the basis of plaintiffs' complaint is not that there was not probable cause to issue the warrant but that the defendants unreasonably executed the warrant at

> the wrong house. The question is not whether the warrant was invalid. The information given to the judge described a particular place, and the officers went to a particular place. The fact that the warrant may have described with particularity the wrong location is not a fault of the warrant. Any mistake is the fault of the informant of the officer who provided the information to the judge. The questions raised by plaintiffs' claim are: would a reasonable officer, having the information available to defendant McCleary, have requested clarification from the informant as to which was the second house along the driveway; . . . ." (App at 10-11)
>
> "In the present case the 'first house' on the driveway, counted by defendant Thomas McCleary, but not counted by the informant, sits well back from the driveway and is serviced by a separate driveway as well as by the driveway mentioned in the warrant. This 'house' may also have been used as an office. The court cannot say as a matter of law that a reasonable officer would not have questioned whether or not the 'first house,' located so far from the driveway and from the other houses, was to be included or not in counting the number of houses along the driveway. For that reason, defendant McCleary's motion for summary judgment on this issue must be denied." (App at 12)

After the trial court denied his motion for summary judgment, Detective McCleary appealed the matter to the Court of Appeals for the Ninth Circuit. On appeal to the Ninth Circuit, Detective McCleary contended that he was entitled to immunity for two reasons.

First, McCleary contended that because the trial court found that the warrant and sworn testimony presented to Judge Davis were valid on their face, the correct standard to apply to McCleary's immunity defense was that of a reckless disregard for the truth as set forth *Franks v. Delaware*, 438 U.S. 154,

155-56, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978) and adopted by the Ninth Circuit in *Branch v. Tunnell*, 937 F.2d 1382 (9th. Cir. 1991), not that of objective reasonableness as set forth in *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). McCleary then contended that under the *Franks* standard, he was immune from liability, because McCleary's mistaken belief that the Villa's house was the "second house on the right" was not the result of his reckless disregard for the truth.

Second, it was McCleary's position on appeal that even if the objective reasonableness standard that had been applied by the trial court was the correct standard to apply to McCleary's conduct, McCleary was still entitled to immunity, because under the circumstances, a reasonable officer could have believed that the first house on the right off the driveway leading to the five houses was to be counted in determining which house was the second on the right.

In response to McCleary's contentions, the Ninth Circuit held that the standard to apply in evaluating McCleary's conduct was the objectively reasonable standard set forth in *Malley*; and that even though the facts were undisputed, the question of McCleary's immunity was for the jury, not the court. (App at 3, 4-5)

REASONS FOR GRANTING THE WRIT.

1. The Ninth Circuit committed the same error in the case at bar as it did in the case of *Hunter v. Bryant*.

Assuming that the correct standard of qualified immunity to apply in the case at bar is one of objective reasonableness, it

is McCleary's position that because the facts are undisputed, the Ninth Circuit should have resolved the immunity issue itself, as opposed to remanding the issue to the trial court for the jury to resolve.

In *Bryant v. United States Treasury Department, Secret Service*, 903 F.2d 717 (9th Cir. 1990), the Ninth Circuit held that the issue of qualified immunity was a jury question, even though the facts on the record were undisputed, because the immunity issue can only be resolved on summary judgment "if there is only one reasonable conclusion a jury could reach." *Bryant v. United States Treasury Department, Secret Service*, 903 F.2d 717, 721. This Court reversed the Ninth Circuit's holding, finding that in cases where the facts are undisputed, the question of immunity is for the court, if the record shows that a reasonable officer could have believed his actions were lawful. *Hunter v. Bryant*, 112 S.Ct. 534, 537.

In the case at bar, the Ninth Circuit did not have the benefit of this Court's holding in *Hunter*; and thus, it followed its previous practice of holding that immunity issues are for the jury, unless there is only one reasonable conclusion a jury could reach. Therefore, in light of this Court's holding in *Hunter*, this matter should either be remanded to the Ninth Circuit for further consideration, or this Court should follow the same course of action it did in *Hunter*, and find that Detective McCleary's conduct was immune from liability, because a reasonable officer could have believed that the first house on the right of the driveway was to be counted in determining which house was the second on the right.

A conclusion that McCleary is entitled to immunity is warranted since there can only be "one" second house on the right, and the Navarro house was, in fact, the second house on the right. Furthermore, the police and utility records showed that all five of the houses located along the driveway used the same set of addresses.

It is important to note that even the Ninth Circuit did not quarrel with the conclusion that one could have reasonably come to the conclusion that the first house on the right was to be counted in determining where Andres Villa's house was located.

> ". . . No one genuinely disputes that there was probable cause to believe that drugs would be found at Villa's house, or that on one view his was the 'second house on the right.' . . ." (App. at 4)

However, instead of then finding that Detective McCleary was immune from liability because a reasonable officer could have believed that Villa lived in the second house on the right, the court held that the issue of McCleary's immunity was for the jury to decide. Since the facts were undisputed and were not going to change because all discovery in the case had been completed, the Ninth Circuit should have resolved the immunity issue itself, "at the earliest possible stage in litigation," as this Court did in *Hunter*; and as this Court should now do, as it did in *Hunter*.

This is not a case where a police officer gets information from an unknown informant that drugs are being sold from the second house on the right, and doing nothing more, gets a search warrant. Rather, this is a case where a police officer (1) gets information from an informant that has proved truthful

on eighteen prior occasions; (2) goes to the scene and views the premises himself; (3) goes to the police files to locate an address; (4) goes to the utility companies to locate an address; (5) gets the warrant; and (6) then draws a sketch of the location of the house for the officers assigned to execute the warrant. Clearly, such actions are not that of an officer who is "plainly incompetent," or one who "knowingly violated the law."

2. The Ninth Circuit applied the wrong standard of conduct to McCleary's immunity defense, because the standard of reckless disregard as set forth in *Franks v. Delaware* is to be applied in immunity cases dealing with an attack upon the accuracy of an affidavit to a search warrant.

The Fourth Amendment to the United States Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Prior to this Court's holding in *Franks v. Delaware*, *supra*, regardless of the circumstances, a person could not challenge the veracity or accuracy of a sworn statement of a police officer that was used by the officer to procure a search warrant. If the warrant and sworn statement were valid on their face, all inquires into the validity of the warrant ended, since only the sufficiency of the "faces" of affidavits and warrants could be challenged.

Stated another way, prior to *Franks*, no "subfacial" challenges of warrants, affidavits, and sworn testimony were allowed; and all inquires by a person whose house was searched pursuant to a search warrant were limited to the "four corners" of the affidavit, sworn statement, and warrant.

In *Franks v. Delaware*, *supra*, the affidavits of the police officers used to obtain the search warrant for the search of the defendant's home were valid on their face, but the defendant contended that the search of his home was nevertheless invalid, because several statements made by the two police officers in their affidavits were false. Specifically, the defendant contended that one of the officers falsely stated in his affidavit that two co-employees of the defendant, Lucas and Morrison, had told the officer that the defendant often wore the type of clothing wore by the suspect that had committed the crime.

The state court refused to allow the defendant the opportunity to attack the veracity and accuracy of the affidavits by calling Lucas and Morrison as witnesses at a motion to suppress hearing. In holding that under certain circumstances such an attack is required by the Constitution, this Court stated as follows:

> ". . . We reverse, and we hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is

> established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." 438 U.S. at 155-56

> "This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true." 438 U.S. at 165

> "In sum, and to repeat with some embellishment what we stated at the beginning of this opinion: There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. **Allegations of negligence or innocent mistake are insufficient.** The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains

> sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." (Emphasis supplied) 438 U.S. at 171-72

In *Branch v. Tunnell*, 937 F.2d 1382 (9th. Cir. 1991), the Ninth Circuit correctly adopted the *Franks* standard for the purpose of defining the scope of the defense of qualified immunity in Section 1983 actions, where the plaintiff is contending that an incorrect statement or conclusion was made in an affidavit that was used to obtain a search warrant. As stated by the Ninth Circuit:

> "In a criminal proceeding, a defendant challenging the veracity of a warrant affidavit is entitled to an evidentiary hearing only if he makes a 'substantial preliminary showing' that 'a false statement knowingly and intentionally, or with reckless disregard for the truth was included by the affiant in the warrant affidavit' and that 'the allegedly false statement is necessary to the finding of probable cause' . . . The *Franks* standard, although developed in the criminal context, 'also defines the scope of qualified immunity in civil rights actions.' . . . Thus, '[i]f an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements . . . he cannot be said to have acted in an objectively reasonable manner,' and the shield of qualified immunity is lost. . . . ." 937 F.2d at 1387

In an action based upon 42 U.S.C. § 1983, when the plaintiff is contending that the search of his home was improper, a court must go through a four-step analysis of the case, when the search of the plaintiff's home was pursuant to a search warrant.

The first step is to identify the deficiency, if any, with the warrant or affidavit.

The second step is to determine if the deficiency appears on the face of the warrant or affidavit (or sworn statement), or whether the deficiency can only be determined by challenging the veracity or accuracy of the statements and conclusions set forth in the warrant or affidavit. That is, does the alleged violation of the requirements of the Fourth Amendment appear on the face of the warrant and affidavit, or is additional evidence needed to show a Fourth Amendment violation.

The third step is to then determine, based upon the determination made in the second step, which standard is to be applied to the immunity defense of the officer; the standard set forth in *Malley*, or the standard set forth in *Franks*.

If the deficiency appears on the face of the affidavit, then the standard set forth in *Malley* applies, and the question for the court is whether a reasonable officer could have believed that the facts set forth in his affidavit complied with the requirements of the Fourth Amendment, even though, as a matter of law, such facts did not.

For example, when an affidavit, on its face, fails to "particularly" describe the place to be searched, the court in applying *Malley* needs to determine if a reasonable officer could have believed that the facts set forth in the affidavit particularly describe the place to be searched, even though, as a matter of law, such facts failed to do so.

If the deficiency does not appear on the face of the affidavit, then the standard set forth in *Franks* applies, and the question for the court is whether the officer knowingly or

recklessly gave false information to the judge issuing the warrant.

For example, when an affidavit, on its face, "particularly" describes the place to be searched, but it turns out that the wrong placed was described, the court needs to determine if the officer knowingly or recklessly described the wrong place to the judge.

The fourth step is to then apply the proper standard to the conduct of the officer, and to determine if the officer is immune.

In the case at bar, the result of the four-step process is as follows:

First step. The deficiency in the sworn testimony of McCleary is his conclusion that Andres Villa lived in the "second house on the right," because we now know that the Navarros lived in the second house on the right.

Second step. The deficiency does not appear on the face of the sworn testimony of McCleary, because McCleary testimony described in detail the location of the house to be search, and the basis for his conclusion that Villa's house was the second one on the right.

Stated another way, in reading the sworn testimony of McCleary, and taking everything set forth therein as true, all of the requirements of the Fourth Amendment have been met, including the requirement that the warrant "particularly" describes the place to be searched. That is, the only way to prove that the second house on the right was not Villa's is by evidence from outside the "four corners" of McCleary's testimony.

This is the same conclusion reached by the trial court when it concluded that:

> "The information given to the judge described a particular place, and the officers went to a particular place. The fact that the warrant may have described with particularity the wrong location is not a fault of the warrant. Any mistake is the fault of the informant of the officer who provided the information to the judge." (App. at 11)

This is also the same conclusion reached by the Ninth Circuit:

> ". . . No one genuinely disputes that there was probable cause to believe that drugs would be found at Villa's house, or that on one view his was the 'second house on the right.' . . ." (App. at 4)

Third step. Because the deficiency in the sworn testimony of McCleary does not appear on the face of his sworn testimony, the proper standard to apply is that set forth in *Franks*.

Fourth step. McCleary did not knowingly or recklessly mislead Judge Davis in telling him that Villa's house was the second house on the right. At most, one can only conclude that McCleary's inaccuracies were due to negligence; and since negligent inaccuracies in an affidavit do not violate the Fourth Amendment, *Franks v. Delaware*, supra, 438 U.S. at 171-72; *U.S. v. Motz*, 936 F.2d Motz, 936 F.2d 1021, 1024 (1991), McCleary's immunity defense should have been allowed.

CONCLUSION

When a qualified immunity defense is presented to a court, and the facts are not in dispute, it is up to the court to resolve the issue, not the jury. This Court recognized this requirement in *Hunter v. Bryant, supra*.

In the case at bar, the Ninth Circuit failed to resolve Detective McCleary's immunity defense as required by *Hunter*, therefore, this Court needs to either issue a writ of certiorari to review the order and opinion of the Court of Appeals; or alternatively, reverse the decision of the Ninth Circuit, and remand the matter for the entry of a judgment in favor of petitioner.

In addition, because Detective McCleary's immunity defense can only be resolved by examining the accuracy of his conclusion that Andres Villa's house was the "second house on the right" with extrinsic evidence, the standard to be applied to McCleary's defense of qualified immunity is that set forth in *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978). Since Detective McCleary did not knowingly or recklessly mislead Judge Davis when he told Judge Davis that Villa's house was the second house on the right, pursuant to the *Franks* standard, McCleary is entitled to immunity.

Respectfully submitted,

Robert E. Franz Jr.

Robert E. Franz Jr,
Attorney and Counsel
for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Jose G. Navarro; Esperanza C. Navarro, Plaintiffs-Appellees,

v.

F.K. Barthel, Defendant
and
Thomas McCleary, Defendant-Appellant

No. 90-35743.

Argued and Submitted November 6, 1991.
Decided December 27, 1991.

Appeal from the United States District Court for the District of Oregon, Robert E. Jones, District Judge, Presiding.

Robert E. Franz, Jr., Eugene, Oregon, for defendant-appellant Thomas McCleary.

Thad M. Guyer, Medford, Oregon, for the plaintiffs-appellees Jose G. Navarro and Esperanza C. Navarro.

Before Thomas Tang, Diarmuid F. O'Scannlain and Pamela Ann Rymer, Circuit Judges.

PER CURIAM:

Thomas McCleary, a Medford police officer, relied on a confidential informant to obtain a search warrant for "the second house on the right" of a street where the Navarros, who were not a target, live. McCleary, and other officers who executed the warrant, figured the Navarros' house was the second house on the right. It was not, and the Navarros brought this 42 U.S.C. §1983 action alleging violation of their Fourth Amendment rights.

The district court denied McCleary's motion for summary judgment on the ground of qualified immunity, applying the standard adopted in *Maryland v. Garrison*, 480 U.S. 79, 85, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987), for determining whether the Fourth Amendment is violated by a search of the wrong location (whether the officers knew or should have known that a mistake had been made in designating the place to be searched). The district court concluded that a triable issue remained whether McCleary acted reasonably in not clarifying which houses were to be considered in determining which was the second house along the driveway.

McCleary contends that the court incorrectly applied a reasonableness standard, and that instead, because he relied on an informant, his conduct should be measured under the test set out in *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). We recently held in *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991), that the *Franks* standard defines the scope of qualified immunity in civil rights actions, and that in those which allege judicial deception, the plaintiff must show that the defendant knowingly included false statements in the affidavit or did so with reckless disregard. *Id.* at 1387. From this, McCleary argues that there was no Fourth Amendment violation because false statements in a search warrant affidavit only invalidate probable cause if the false statements are statements of the officer, not an informant, and that he is entitled to qualified immunity because he did not make the statements about where the house was falsely or recklessly.

We believe the district court correctly characterized this

case as involving the Navarros' Fourth Amendment right to a warrant describing with sufficient particularity the location to be searched, not as a case involving whether the warrant was validly issued with probable cause. We conclude, therefore, that the district court properly judged McCleary's conduct under an objectively reasonable standard. Accordingly, we affirm.

I

On August 15, 1988, Detective McCleary met with Pedro Ramirez, a confidential informant, who told him that Andres Villa was dealing cocaine out of his house. Ramirez said that Villa's home was the second house on the right side of a driveway leading off Agate Road to the Southern Oregon Tallow Company.

Police and utility records indicated only that Villa lived on the Tallow Company's property. McCleary obtained a warrant that directed officers to take the center driveway, and drive towards the Tallow Company buildings to the "second house on the right," which was occupied by Villa. The access road has one house near the corner of the driveway and Agate Road, then four other houses along the driveway. The informant evidently did not include the house on the corner when he described the house to be searched as the second house along the driveway. The officers executing the warrant counted differently, and ended up kicking down the Navarros' door at 11:05 p.m. the night of August 24.

II

[1] Under the Supreme Court's recent decision in *Siegert v. Gilley*, __ U.S. __ , 111 S. Ct. 1789, 1793, 114 L. Ed. 2d

(1991), we must first determine whether the Navarros have "asserted a violation of a constitutional right at all." They have, because the right to be free from a search of the wrong place, even when executed pursuant to a warrant, is secured by the Fourth Amendment. *See United States v. Collins*, 830 F.2d 145 (9th Cir. 1987); *see also Maryland v. Garrison*, 480 U.S. at 84.

III

[2] McCleary contends that the next thing we must decide is whether there was probable cause to believe that the second house on the right was Villa's. If so, he argues, that ends the inquiry in the absence of evidence that his statements were deliberately or recklessly made in disregard of the truth. We disagree, however, that this is strictly a probable cause question. No one genuinely disputes that there was probable cause to believe that drugs would be found at Villa's house, or that on one view his was the "second house on the right." Rather, we agree with the district court that the question in this case is whether a police officer in McCleary's position would reasonably have described the location with sufficient particularity to direct those executing the warrant to the correct house on the right.

[3] Accordingly, we do not see this as a claim based on judicial deception such that the *Franks* test is triggered. The Warrant Clause categorically protects against unreasonable searches of places inadequately described. *Maryland v. Garrison*, 480 U.S. at 84. The district court therefore correctly determined that it is for the jury to decide whether McCleary acted reasonably, based on information about the layout of the

Tallow Company premises that he knew or should have known, to assure that the wrong place was not searched. *See Brady v. Gebbie*, 859 F.2d 1543, 1556 (9th Cir. 1988), *cert. denied*, 489 U.S. 1100, 109 S. Ct. 1577, 103 L.Ed. 2d 943 (1989).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOSE G. NAVARRO and ESPERANZA C. NAVARRO, husband and wife,	)	
Plaintiffs,	)	CIVIL NO. 89-1076-JO
v.	)	OPINION & ORDER
F. K. BARTHEL, individually; ROBERT KENNEDY and THOMAS MCCLEARY individually and in their official capacities; and the CITY OF MEDFORD, OREGON and JACKSON COUNTY, OREGON, public corporations,	)	
Defendants.	)	

JONES, Judge:

This is an action under 42 U.S.C. § 1983 with pendant state claims arising out of a search of plaintiff's home on the night of August 24, 1988.

Medford Police detective Thomas McCleary obtained information from an allegedly reliable informant concerning drug possession by one Andres Villa, who lived in one of several small homes located on an access road to the Southern Oregon Tallow Co. The informant was familiar with all the houses along the road. McCleary went to a judge and obtained a warrant that stated:

> You are hereby commanded to search that certain premises at 10175 and 10195 Agate Rd. White City,

> county of Jackson, State of Oregon, further described as an older single story, single family dwelling, located in front of the Southern Oregon Tallow Co. The Southern Oregon Tallow Co. has five houses and two mobile homes in front of it, using the addresses of 10175 and 10195 Agate Rd. and three driveways leading to the Tallow Co. Buildings. Take the center driveway, and drive towards the Tallow Co. Buildings. The second house on the right is occupied by Andres Villa, and is to be searched.

The driveway in question has one house near the corner of the driveway and Agate Road, and then four other houses along the driveway. The informant who described the driveway to officer McCleary apparently was not including the house on the corner when he described the house to be searched as the second house along the driveway.

When issued, the warrant did not include an authorization to serve at any time of day. ORS 133.565(3) states that, unless indorsed by the issuing judge, a warrant shall be executed between the hours of 7 a.m. and 10 p.m. The warrant was eventually executed at 11:05 p.m. Before leaving to execute the warrant, Barthel was told that the issuing judge had indorsed the warrant for service after 10:00 p.m. There is some dispute whether this actually happened.

The warrant was given to officer Barthel to serve. Barthel was in charge of a multi-agency group of police officers. Officer McCleary did not participate in the execution of the warrant. When Barthel's team arrived to search the second house along the driveway, the group of officers went to plaintiffs' home, rather than the home of the suspect, which was next door to plaintiff's' house.

Barthel's team knocked at plaintiffs' door and announced

that they were police officers with a search warrant. When no one answered, the officers began kicking at the door to gain entry. Plaintiff Henry Navarro, apparently awakened by the noise, came to the door and loosened the latch from inside. This allowed the officers to enter. The officers forced plaintiffs to the floor while they searched the house. Plaintiffs protested that the officers were at the wrong house. Upon learning that they were at the wrong house some officers left to search the suspect house next door, while other officers remained in plaintiffs' home to discuss the mistake with plaintiffs and to use plaintiffs' telephone to change the warrant. Plaintiffs filed suit under 42 U.S.C. § 1983, alleging a violation of their Fourth Amendment rights. Plaintiffs also allege pendant state law claims for invasion of privacy and intentional infliction of emotional distress. Defendants have filed motions for summary judgment, seeking summary judgment on all of plaintiffs' claims.

Plaintiffs' 42 U.S.C. § 1983 claims.

1. Individual officers.

Plaintiffs' claims are that their constitutional rights were violated because the search was executed at an unreasonable and unauthorized time, entry was made in an unreasonable manner, the force used was unreasonable and excessive, the search and restraint took an unreasonable amount of time, and because the officers remained on their premises without probable cause. The officers move for summary judgment based on claims that the warrant was validly issued and that they are entitled to qualified immunity. Officers Kennedy and Barthel also move for summary judgment on the pendant state

law claims.

While the different actions of the officers require some separate analysis for each officer, some general remarks can be made with regard to all the claims. All of plaintiffs' claims are based on allegations of a violation of plaintiffs' fourth amendment rights. Both a search which is alleged to violate constitutional rights and the use of excessive force during the search or seizure are to be measured by the same standard: whether the actions can objectively be said to be legally reasonable under the circumstances facing the officers. *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Graham v. Connor*, 109 S.Ct. 1865, 1872 (1989).

Thus, the defendant's motions ask the court to determine "the objective legal reasonableness of the action[s] assessed in light of the legal rules that were clearly established at the time it was taken." *Anderson*, 483 U.S. at 639. The question of whether the rights allegedly violated in this case were clearly established is fairly easy. While the Court in *Anderson* required that the "contours of the right must be sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right," that does not mean that plaintiffs must point to an exactly similar case to show that their rights would be known to a reasonable official. The right to be free from a search of the wrong house, even when that search is based on a warrant, where the warrant or its use is somehow improper, is clearly established and was established at the time the search was carried out. *See United States v. Collins*, 830 F.2d 145 (9th Cir. 1987). The same is true of the

right to be free from excessive use of force. This right was established well before the incidents of this case. *See Berquist v. County of Cochise*, 806 F.2d 1364 (9th Cir. 1986). That these rights were established does not mean, however, that defendants are not entitled to summary judgment. That question must turn on the second part of the test: would a reasonable officer under the same circumstances have recognized that the officer's actions in this case were a violation of these established rights? To answer that question, we must turn to each step of the process that led up to the alleged violations.

A. Obtaining the warrant.

This is a somewhat unusual case, and does not fit easily into the *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) standard, as defendants suggest it should. In *Malley* the court held that the test for civil liability for a improperly issued warrant was whether a reasonable officer would have known that the affidavit failed to establish probable cause. Defendants seek to place this case in the *Malley* mold by arguing that they are entitled to summary judgment because there was sufficient information in the warrant to establish probable cause. Further, those officers who did not obtain the warrant claim they were entitled to rely on the magistrate's independent review of the information. Were this the gravamen of plaintiffs' claim, the officers might well be right.

Although there is some loose language, the basis of plaintiffs' complaint is not that there was not probable cause to issue the warrant but that the defendants unreasonably

executed the warrant at the wrong house. The question is not whether the warrant was invalid. The information given to the judge described a particular place, and the officers went to a particular place. The fact that the warrant may have described with particularity the wrong location is not a fault of the warrant. Any mistake is the fault of the informant of the officer who provided the information to the judge. The questions raised by plaintiffs' claim are: would a reasonable officer, having the information available to defendant McCleary, have requested clarification from the informant as to which was the second house along the driveway; and, would a reasonable officer, arriving to execute the warrant, have requested clarification as to which of the several houses was to be included to calculate the second house on the driveway?

The answer to these questions must be determined based on the facts as known to the officers at the time. This case has some of the same tale of errors described in *Maryland v. Garrison*, 480 U.S. 79, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987), and a part of that decision is directly applicable to this case. In *Maryland v. Garrison*, officers obtained an otherwise valid warrant that directed them to search the third floor apartment of a suspect. Unknown to the officers requesting the warrant and to those conducting the search, there were two apartments on the third floor. The case concerned a motion to suppress the evidence found in the search of the wrong apartment.

The Supreme Court has held that the same standards applicable to motions to suppress should be used in section

1983 actions to test for violations of the fourth amendment. *Malley v. Briggs*, 475 U.S. at 344. The test for whether there was a violation of the fourth amendment in a search of the wrong location is whether the officers knew or should have known that a mistake had been made in designating the location to be searched. *Maryland v. Garrison*, 107 S.Ct. at 1017.

In the present case the "first house" on the driveway, counted by defendant Thomas McCleary, but not counted by the informant, sits well back from the driveway and is serviced by a separate driveway as well as by the driveway mentioned in the warrant. This house may also have been used as an office. The court cannot say as a matter of law that a reasonable officer would not have questioned whether or not the "first house," located so far from the driveway and from the other houses, was to be included or not in counting the number of houses along the driveway. For that reason, defendant McCleary's motion for summary judgment on this issue must be denied.

B. Execution of the warrant.

Defendant McCleary did not participate in the execution of the warrant. He was, however, involved in the planning for the execution of the warrant, and provided information to the officers who actually executed the warrant. Defendant McCleary provided these officers with a sketch of the area, showing all the houses and marking the house to be searched. The house marked was the plaintiffs' house, not the suspect's house. Plaintiffs have also offered evidence in opposition to the motion for summary judgment that there was some

discussion among the officers as to exactly which house was to be searched. However, the evidence does show that the officers were given assurances of the reliability of the informant and the credibility of the evidence. The sketch of the driveway would serve to answer any questions that a reasonable officer might have had concerning whether or not to include the first house. The court cannot say as a matter of law that it was unreasonable to rely on the warrant and defendant McCleary's assurances concerning counting the houses along the driveway. Because defendants Barthel and Kennedy had no knowledge or reason to know that the information was not particular enough to describe the proper suspect's house, under the standard of *Maryland v. Garrison*, summary judgment on this question is granted for defendants Barthel and Kennedy.

C. Late night execution.

The warrant was originally endorsed only for execution prior to ten o'clock at night. Plaintiffs claim that its execution after eleven was unreasonable and therefore a violation of their Fourth Amendment rights. Defendants have moved for summary judgment, claiming that they were authorized to serve the warrant after ten p.m., or that there "is no dispute that Defendant Barthel called to confirm the warrant authorized night service."

Defendant McCleary is not liable for the hour of execution. There is no dispute McCleary was not involved after the warrant was delivered to Barthel and the situation of the houses was described to Barthel. Summary judgment for defendant McCleary on the issue of late night execution is

granted.

Defendant Kennedy has not sought summary judgment with particularity on the issue of late night execution, instead relying on an assertion of good faith immunity against all constitutional challenges. The standard with regard to this issue is the same as other issues concerning the allegations of fourth amendment violations: would a reasonable officer have recognized a violation of plaintiffs' rights in the execution of a warrant at 11:05 p.m., where the warrant on its face only authorized execution before 10:00 p.m.?

"State law is often relevant in analyzing the reasonableness of police activities under the fourth amendment." *Reed v. Hoy*, 891 F.2d 1421, 1427 n.5 (9th Cir. 1989) In the present case, state law defined when the warrant could be served and provided a method for late night execution. If this method was not utilized, so that the warrant was improperly served at a time when it should have been held in abeyance, the search was unreasonable. Whether the magistrate extended the time for execution is normally a fact question.

Officer Barthel seeks summary judgment in his favor on this issue by arguing that there has been no dispute that he received word that late night execution of the warrant was authorized. Plaintiffs have, however disputed this. Plaintiffs assert that the court records fail to show that later execution of the warrant was authorized. Plaintiffs have also called into question two of the three descriptions of the method of obtaining authorization for late night execution offered by officers McCleary and Barthel. While the plaintiffs have not

challenged officer Barthel's credibility in so many words, plaintiffs have demonstrated that there is a factual question remaining as to whether the warrant was ever modified to authorize late night execution. Summary judgment on this question cannot be granted for officers and Barthel.

D. Excessive force.

Plaintiffs complain that the officers used excessive force in beginning to kick in the front door soon after the officers announced that they were police officers with a warrant, in pointing their weapons at or near the plaintiffs upon entering plaintiffs' home, in forcing Mr. Navarro to the floor and in grabbing Mrs. Navarro's arm and forcing her to the floor, leading to abrasions on Mrs. Navarro's arm.

The officers' conduct must be viewed in light of the fourth amendment objective reasonableness standard. *Graham v. Connor*, 109 S.Ct. 1865 (1989). At the time the officers arrived at plaintiffs' home they believed that they were about to search the home of a known drug dealer. Experience with such searches has led to the development of standard policies which are designed to protect the officers and any innocent persons who may be in or about the place to be searched. Kicking down doors, pointing guns at people, shouting at people, forcing unarmed inhabitants to lie on the floor, even pulling or pushing people down who are told to get down and who do not because they do not speak English are governed by standard police procedures and these actions may be reasonable under circumstances similar to those the officers believed they would encounter in this search.

Plaintiffs cannot simply rely on Tennessee v. Garner, 471

U.S. 1, 105 S.Ct. 1694, 85 L.ed.2d 1 (1985) for an argument that it was unreasonable to presume that the occupants of the home might be armed. While it may be improper to presume that all felons are armed and therefore justify the use of deadly force based on this presumption, it is not improper to presume that there is a possibility that the occupants of a drug dealer's home may be armed until observation tells one differently. Defendants have not offered evidence to show that their assumption was objectively reasonable, so a dispute as to the material facts remains on this issue.

In assessing the reasonableness of the use of force to effect a particular seizure, the Court has identified the following specific factors: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 109 S.Ct. at 1871. It may be, as defendants claim, standard practice during the search of a supposed drug dealer's residence to place unarmed persons on the floor so that these people do not wander around to places where they might be shot or pose a danger to the officers. The acts of the officers may have been pursuant to standard procedure, but the particular amount of force used to carry out the policy is a question of fact and the amount of force used in this case remains disputed.

Whether the force used to get Mrs. Navarro to the floor was greater than an objective officer would have determined to be necessary at the time, whether weapons were pointed at plaintiffs while they were on the floor and whether this was

objectively reasonable behavior, and whether plaintiffs continued to be mistreated after the plaintiffs had announced that the officers were in the wrong location are all matters which are factually disputed. When the dispute is viewed in the light most favorable to the non-moving party, a question remains concerning the objectively reasonableness of the conduct. *Hansen v. Black*, 885 F.2d 642, 645 (9th Cir. 1989). Summary judgment cannot be granted on this issue.

D. Staying in the home.

After defendants discovered their mistake, defendants remained in plaintiffs' home, used the plaintiffs' telephone to have the warrant modified, and took photographs of the scene to document the damage. Plaintiffs allege that this was a separate violation of their fourth amendment rights. Defendants argue that they received permission to use the telephone, and that they were never actually asked to leave.

However justified defendants were is going to the wrong house, that justification ended when they discovered that they were in the wrong place. Once that discovery is made, the police must reasonably limit their behavior accordingly. *Maryland v. Garrison*, 107 S. Ct. at 1019 n. 14. The court cannot say as a matter of law that defendant's conduct after their discovery that they were in the wrong house was objectively reasonable. Defendants have offered little explanation, and their reliance on plaintiffs' consent, which plaintiffs dispute, will not justify summary judgment under these circumstances. Therefore, summary judgment on this issue will be denied for defendants Barthel and Kennedy.

Conclusion.

The court does not grant summary judgment on all aspects of the plaintiffs' case for any one of the individual defendants. Questions of fact remain to be resolved with regard to some of plaintiffs' claims. What follows is a summary of this court's conclusions.

Defendant McCleary: a question remains whether defendant McCleary acted reasonably in not clarifying which houses were to be considered in determining which was the second house along the driveway. Summary judgment cannot be granted for this defendant on plaintiffs' claims that their rights were violated when the officers approached the wrong house. Since the identification of the house is the extent of defendant McCleary's involvement, summary judgment can be granted for this defendant on plaintiffs' other claims.

Defendant Barthel and Defendant Kennedy: Summary judgment is proper for these defendants on the issue of selecting the wrong house. Summary judgment must be denied on plaintiffs' excessive force claim and on the issue of use of the warrant after 10:00 p.m. Summary judgment is denied on the question of whether the officers properly remained on the premises after determining that they were at the wrong location and on any question of the officers' behavior after they were certain that they were at the wrong location.

2. City of Medford and Jackson County. The governmental entities are not liable under a theory of respondeat superior for the actions of the police in any § 1983 action. Monell v. Department of Social Services, 436 U.S.

658, 694 n.58, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). These defendants can only be liable if they have a policy which allowed their employees to violate constitutional rights, and if the plaintiffs' rights were actually violated.

The governmental entities in this case have moved for summary judgment solely on the grounds that there was no violation of rights by their employees. Since the court has been unable to determine as a matter of law that there have not been any violations of plaintiffs' rights, the court cannot grant summary judgment for the City of Medford or Jackson County. If these defendants wish to submit further motions based on the particular questions of governmental responsibility as a result of the policies of these governmental entities, the court will give further consideration to these arguments.

Plaintiffs' pendant state law claims.

Plaintiffs also seek damages based on violations of state law, alleging that defendants' actions amount to an intentional infliction of emotional stress and an invasion of plaintiff's rights to privacy.

Defendants Kennedy and Barthel seek summary judgment on plaintiffs' intentional infliction of emotional distress claim. Defendant Jackson County asserts that plaintiffs' claim in this regard is only aimed at the individual defendants. Without deciding that question, Jackson County will be considered to have moved for summary judgment on this claim.

To state a claim for intention infliction of emotional distress a plaintiff must plead that (1) the defendants intended to inflict severe emotional distress on the plaintiff, (2) the

defendants were the cause of the plaintiff's severe emotional distress, and (3) the defendants' acts constituted an extraordinary transgression of the bounds of socially tolerable conduct." *Sheets v. Knight*, 308 Or. 220, 236, 779 P.2d 1000, 1010 (1989).

Even if the court were to assume that the intent that the officers had when they pointed their weapons at the plaintiffs was the type of intent that would constitute an intent to inflict emotional distress, and the court does not make such an assumption, plaintiffs have failed to plead or make any showing that the conduct exceeded the bounds of social tolerance. Summary judgment is granted to defendants Barthel, Kennedy and Jackson County on plaintiffs' claim of intentional infliction of emotional distress.

Defendant Barthel seeks summary judgment on the plaintiffs' claim of "invasion of privacy." Barthel argues that Oregon does not recognize a claim for invasion of privacy beyond unauthorized publication of information, and then goes on to argue that plaintiff has no other grounds for such a claim.

In their complaint plaintiffs allege that by violating O.R.S. 135.565, which limits the execution of warrants to reasonable times, defendants violated plaintiffs' statutory rights. While plaintiffs' claim is not clearly labeled as such, it is in essence a claim for what in Oregon is commonly referred to as a statutory tort. See. e.g., *Bellikka v. Green*, 306 Or. 630, 650, 762 P.2d 997 (1987). Defendant Barthel does not address the nature of plaintiffs' claim in the motion for summary judgment. Therefore, this aspect of the motion is

denied.

For the reasons set forth, defendants motions (## 24, 37, 44) for summary judgment are denied in part and granted in part.

Dated this 16th day of August, 1990.

/s/ Robert E. Jones
ROBERT E. JONES
United States District Judge

APPENDIX C

IN THE DISTRICT COURT OF THE STATE OF OREGON
FOR JACKSON COUNTY

SEARCH WARRANT

IN THE NAME OF THE STATE OF OREGON
TO ANY POLICE OFFICER IN THE STATE OF OREGON,
GREETINGS:

You are hereby commanded to search that certain premises at 10175 and 10195 Agate Rd. White City, County of Jackson, State of Oregon, further described as an older single story, single family dwelling, located in front of the Southern Oregon Tallow Co. The Southern Oregon Tallow Co. has five houses and two mobile homes in front of it, using the addresses of 10175 and 10195 Agate Rd. and three driveways leading to the Tallow Co. Buildings. Take the center driveway, and drive towards the Tallow Co. Buildings. The second house on the right is occupied by Andres Villa, and is to be searched, and to search all vehicles of persons at the residence of Andres Villa, and the personal effects and bodies of any persons at Andres Villa, for the controlled substance cocaine, paraphernalia, proof of ownership and sales,

and if you find the same, or any part thereof, to seize the same, and

You are further directed to make return of this warrant to me within five (5) days after execution thereof.

___ This warrant my be executed at any time of the day or night.

___ This warrant may be executed more than five (5) days but

not more than ten (10) days from its date of issuance.

Dated this 24 day of August, 1988 at 2:10 o'clock p.m.

/s/ Ross G. Davis
District Judge

STATE OF OREGON)
) AFFIDAVIT FOR SEARCH
COUNTY OF JACKSON) WARRANT

My name is Detective Tom McCleary, I am with the Medford Police Department, it is August 24, 1988 at 2:00 PM. I am in the presence of Judge Ross Davis, Jackson County District Court.

I am Judge Ross Davis. Tom McCleary is here with me and I ask Detective McCleary if he would raise his right hand. Do you solemnly swear or affirm that the testimony that you are about to give in the cause now pending will be the truth, the whole truth and nothing but the truth?

Detective McCleary: Yes, sir.

Judge Davis: And you plan to give me information under oath for the issuance of a search warrant?

Detective McCleary: Yes, sir.

Judge Davis: Sir, if you would go ahead.

Detective McCleary: I, Tommy E McCleary, after first being duly sworn upon oath depose and say:

That I am a police officer with the Medford Police Department, located in the City of Medford, County of Jackson, State of Oregon, and have been so employed since 1971. That I have reason to believe, that certain premises located at 10175 Agate Road, White City, and 10195 Agate Road, White City, County of Jackson, State of Oregon,

further described as an older single story, single family dwelling located in front of the Southern Oregon Tallow Company & the Southern Oregon Tallow Company has 5 houses and 2 mobile homes in front of it, using the addresses of 10175 and 10195 Agate Road, there is no way to distinguish which of these houses are using which Addresses, there are three driveways leading to the Tallow Company buildings and if you take the center driveway and drive towards the Tallow Company buildings, the second house on the right side of the driveway is occupied by Andres Villa and contains the controlled substance cocaine, cocaine paraphernalia and that said above described property is contraband, contrary to the laws of the State of Oregon. That the facts supporting my above described beliefs are as follows.

That within the past 48 hours, I have been contacted by a confidential and reliable informant. The informant told he that the informant had been inside of the residence at the Tallow Company, occupied by Andres Villa and observed 4 ounces of cocaine packaged in plastic bags. The informant told me that the residence is occupied by Andres Villa. The informant described the residence being located on Agate Road directly in front of the Rogue Valley Tallow Plant and that the driveway to the Tallow plant runs right past the residence. The informant described the residence as being a single family residence, one story and being located at the second house on the right hand side of the driveway after turning after off of Agate Road. The informant told me that the informant wishes to remain anonymous due to fear of physical repercussions

should the identity of the informant be revealed. That I believe the informant to be truthful and reliable based upon the following:

That I have known the informant since October 1987. During my time of association with the informant, the informant has provided me 18 names and locations of persons involved in criminal activity in drugs. That I have been able to confirm those names and locations from two independent sources. That I have received information from the informant alleging if a police officer went to a specific location and contacted a specific person that the police officer would be able to purchase cocaine or heroin. That a police officer under my surveillance and control, went to the location given by the informant and contacted the person that the informant told me to contact and purchased cocaine from that person. The police officer requested to purchase heroin from that person and was told by that person that he could obtain heroin for the police officer.

No arrest has been effected on the purchase of the cocaine at this time due to a current ongoing investigation involving that person. That I have personally been (oops, excuse me, this is an error on my part). That I have checked the Medford Police Department files and found Andres Arellanos Villa is know to the Medford Police Department due to his criminal activity in drugs. That I have personally received a prior report of Andres Villa having been involved in criminal activity in drugs. That I have spoke with Detective R C. Kennedy of the Jackson County Sheriff's Office who showed me a letter that was intercepted from a prisoner in the Jackson

County Jail. That letter was written within the first two weeks of August, 1988 to Andres Villa and stated that the writer needed to purchase controlled substances from Andres Villa. That I have checked the Medford Police Department files and found that Andres Villa is the brother of Rito Villa and an associate of the people which killed Medford Police informant Maria Rodrigo in retaliation for providing information to the Medford Police Department. I believe the informant's life would be in danger if the informant's identity was revealed.

That I recognize cocaine as a controlled substance, due to my having been a police officer for more than 17 years in Medford, Oregon. That I have received training in narcotics investigation from federal, state and local authorities. That I have been specifically assigned to the Detective Division of the Medford Police Department, that the investigation of narcotic related cases is part of the function of the Detective. My formal law enforcement training includes that received from the Board Of Police Standards and Training for certification as a police officer in the State of Oregon, a portion of which was dedicated to the detection and identification of controlled substances. As a police officer for the City of Medford, I have received training instruction on the subject of controlled substances on a continuing in-service basis at my place of employment. During the course of my employment as a narcotic enforcement officer with the Medford Police Department, I also instructed classes for the Board of Police Standards and Training, Oregon National Guard, U.S. Army Reserves, Civic Groups and the Medford, Phoenix, and Eagle

Point School Districts. I have the total law enforcement experience of approximately 17 years. During this time I have made field identification of suspected controlled substances, more than 200 times, and have had these identifications confirmed by later laboratory analysis.

Based upon my experience and training as a police officer, I am aware that people who sell cocaine, normally have paraphernalia for the use, packaging and consumption of cocaine and photographs and papers showing proof of ownership and sales within their residence and vehicles. Further I am aware that persons who sell controlled substance, including cocaine., normally will keep the controlled substance on their person, in their residence, in out buildings on the curtilage, buried on the curtilage and will keep and transport the controlled substances in their vehicles. I am also aware that it is a common practice for persons selling controlled substances to only show the person purchasing the controlled substance a small amount and to keep the remainder out of sight. Based on my training and experience, I am aware that persons who sell and possess controlled substances are often in the possession of firearms on their person, in their residence and in their vehicles and they use the firearms against police officers doing the execution of search warrants. Based upon my training and experience, I am aware that persons who sell controlled substances often take in trade, property for the controlled substances knowing that the item is stolen, including but limited to car stereo equipment, home stereo equipment, video recording equipment, tools and firearms. That I am aware that persons that purchase controlled

substances in small amounts will conceal it in their clothing, wallets, purses and other items under their control. That based upon my training and experience, I am aware that persons visiting at the residence at the time of the execution of a search warrant are usually there for the purpose of purchasing or using controlled substances and are often in the possession of the controlled substance that they purchased and further that some of these people had been in the possession of firearms.

Based upon my training and experience, I am aware that the controlled substance cocaine is usually packaged for sale in small plastic bags and pharmaceutical paperfolds in the amounts of 1/8, 1/4, 1/2 and 1 gram amounts as well as 1/16, 1/8 and 1/4 ounce amounts. I am aware that 1/8 ounce is approximately 3 1/2 grams and that 1/4 ounce is approximately 7 grams. That the use of l/2 gram of the controlled substance cocaine in a 48 hour period is the average amount consumed by a frequent user of cocaine. That based upon the above mentioned information, it is reasonable to believe, by me, that at the time of the execution of the search warrant, there would Still be a supply of the controlled substance cocaine at the residence located in front of the Tallow Company occupied by Andres Villa.

That based upon the above and foregoing, I hereby pray for a warrant to search those premises described as a house located on Agate Road in front of the Tallow Company, using the addresses of 10175 and i0195 Agate Road, White City, County of Jackson, State of Oregon, further described as an older, single-story, single family dwelling, located in front of the Southern Oregon Tallow Company. The Southern Oregon

Tallow Company has 5 houses, 2 mobile homes in front of it, using the address of 10175 and 10195 Agate Road and three driveways leading to the Tallow Company buildings. Take the center driveway and drive towards the Tallow Company buildings. The second house on the right side of the driveway is occupied by Andres Villa and to search any vehicles belonging to or operated by persons found at 10175 Agate Road and 10195 Agate Road residence occupied by Andres Villa and the persons of any people found at Andres Villa's residence, for the controlled substance cocaine, cocaine paraphernalia, proof of ownership and sales and an order to seize the same if found.

Judge Davis: That concludes then, your testimony for the affidavit?

Detective McCleary: Yes, sir.

Judge Davis: I now find that it is 10 minutes after 2:00 and find that there is probable cause for the warrant as requested and we will turn off the tape.

ORIGINAL

Supreme Court, U.S.
FILED
APR 24 1992
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MAY 1 1992

No. 91-1550

In the Supreme Court of the United States

OCTOBER TERM 1991

THOMAS MCCLEARY,

Petitioner,

V.

JOSE G. NAVARRO AND ESPERANZA C. NAVARRO,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WITH APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

Petitioner's presentation of the questions presented for review is incomplete. Two additional questions, which are sub-questions of those petitioner presents, as well as more central to effective review, and which neither this Court nor the Ninth Circuit have ever answered, are:

1. Was the petitioner's act of ascertaining the correct location description of the criminal suspect's home a "discretionary" function, rather than a ministerial one, sufficient to invoke qualified immunity at all, in view of this Court's immunity jurisprudence since Harlow v. Fitzgerald, 457 US 800, 73 L Ed 2d 396, 102 S Ct 2727 (1982) and Westfall v. Erwin, 484 US ___, 98 L ed 2d 619, 627, 108 S Ct ___ (1988)?

2. Does the particularity requirement of the warrant clause of the Fourth Amendment impose upon police officers a "duty to investigate" to insure the accuracy of the particularized description of residence to be searched, in view of the reasoning of this Court in Marron v. United States, 275 US 192, 72 L Ed 231, 236 (1927) and Maryland v. Garrison, 480 US 79, 94 L Ed 2d 72, 80-83, 107 S Ct 1013 (1987)?

3. Is "constitutional negligence" the liability standard, as respondent asserts, in a Section 1983 action alleging injury resulting from a police officer's failure to comply with the particularity requirement of the warrant clause of the Fourth Amendment, in view of this Court's letting stand the Second

Circuit's "constitutional negligence" holding below under the probable cause requirement of the warrant clause in Malley v. Briggs, 475 US 335, 341, 89 L ed 2d 271, 106 S Ct 1092 (1986)?

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OPINIONS BELOW

Petitioner correctly references the opinions below, except that the Ninth Circuit opinion has now been published as Navarro v. Barthel, 952 F.2d 331 (9th Cir. 1991).

STATEMENT OF JURISDICTION

Petitioner correctly states the Court's jurisdiction under Mitchell v. Forsyth, 472 US 511, 528, 86 L Ed 2d 411, 105 S Ct 2806 (1985) only if he is correct in asserting no material fact issues exist on the immunity question. However, because petitioner argues such fact issues do exist, this interlocutory appeal is inappropriate. Moreover, respondents contend that this Court should make more explicit the restrictions on collateral review available under Mitchell.

STATEMENT OF THE CASE

Respondents accept petitioner's rendition of the basis of jurisdiction in the lower courts, and the non-argumentative portions of the procedural history. However, respondents take issue with petitioner's statement of the material facts.

Petitioner's Statement of Procedural History: As to the argumentative portions of the procedural history, Detective McCleary states that "the trial court agreed that the warrant was valid and based upon probable cause". This statement has been misperceived by petitioner. While the trial judge did say that the erroneous particularity was "not the fault of the warrant *** but the fault of the informant", this falls short of a finding of validity. The trial judge may have expressly declined to make

that ruling: "The question is not whether the warrant was invalid". (Opinion & Order, p.6).

Petitioner's Summary of Material Facts: As to the petitioner's statement of material facts, if the particularity requirement of the Fourth Amendment imposes no meaningful duty to investigate to insure the correctness of the location description, then respondent accepts petitioner's statement of the facts.

Respondents' Supplemental Summary of Material Facts:

If there is a constitutional duty under the Warrant Clause to investigate, then petitioner has misperceived the record below in asserting that there are no fact questions to be resolved in determining the immunity issue. The following is a supplement to the material facts stated by petitioner:

The respondents surname is "Navarro". They live on an unnamed road, in an unnumbered green-colored house surrounded by a chain link fence. Their neighbors have the surname "Villas". They live next door on the same unnamed road, also in an unnumbered house, but which is distinguishable by many features, including the facts that it is yellow-colored and fronted by a white picket fence. The Navarros' home was searched pursuant to a warrant expressly directed at the home of "Villas", but with a location description consisting only of geographically oriented terms like "the second house on the right" down the "center driveway". This description omitted references to house color, fences, and other distinguishing features.

During discovery, Detective McCleary declined or was unable to point out any mitigating circumstances which precluded him from inserting more individualized location detail in his affidavit and warrant. He had days to get the description right. He had already disregarded a warrant for the same search issued by the first state judge before presenting a second warrant to a second state judge days or weeks later. The notes of fellow officers attending the pre-raid meeting with Detective McCleary in the morning reference house color and fence type, yet when Detective McCleary appeared before the second judge at 2:00 p.m. later that day he omitted these references. Not even clerical pressures were present, since Detective McCleary's sworn tape-recorded presentation for the warrant was oral.

Notwithstanding his sworn denials, another police officer swore in his deposition that petitioner during the morning had committed to other officers to obtain clarification of the residence description, but he never did so. Despite his claims of inability to do so, petitioner could have photographed the homes from the ground or from the air (as respondents did in providing the Appendix photograph), and then asked the informant to point to the correct house.

REASONS FOR NOT GRANTING THE WRIT

1. The writ should not be granted because the petition for it misperceives the Ninth Circuit's holding as to unresolved questions of material facts.

The trial judge found it to be a jury question whether Detective McCleary could have reasonably declined to ask the informant for clarification or to otherwise ascertain any mistakes or omissions in his description. The respondents argued this below as the "duty to investigate" implied by the particularity requirement of the Warrant Clause of the Fourth Amendment. Although not expressly so stating in its per curiam, the Ninth Circuit should fairly be understood to have remanded as the jury question not an immunity issue of objective reasonableness, but a core fact issue of what investigative tools were reasonably available to petitioner in getting the house description correct.

Petitioner misunderstands the following holding of the Ninth Circuit:

> Rather, we agree with the district court that the question in this case is whether a police officer in McCleary's position would reasonably have described the location with sufficient particularity to direct those executing the warrant to the correct house on the right. [Court's emphasis].
>
> Accordingly, we do not see this as a claim based on judicial deception such that the Franks test is triggered. The Warrant Clause categorically protects against unreasonable searches of places inadequately described. Maryland v. Garrison, 480 U.S. at 84, 107 S.Ct. at 1017. The district court therefore correctly determined that it is for the jury to decide whether McCleary acted reasonably, based on the information

> about the layout of the Tallow Company premises that he knew or should have known, to assure that the wrong place was not searched.

Navarro, supra at 952 F.2d 333. Nowhere in this holding does the Ninth Circuit suggest that the immunity question, per se, is for the jury. The holding does not even use the word "immunity". Instead, a fair reading of the holding in context is that the jury is to decide the disputed fact questions of what petitioner "knew or should have known" regarding the location description of the correct house.

2. The writ should not be granted because the petition for it misperceives the act of ascertaining a location description as a discretionary function, when it is only a ministerial one not invoking immunity defenses at all.

While determinations as to the existence of probable cause and what facts adequately support it may well require exercise of discretion, the procedural requirements of the Warrant Clause of the Fourth Amendment do not. For example, the requirement that an officer present his facts in sworn form is clearly a ministerial rather than discretionary function. In the present case, the officer's determination that the suspect was probably selling drugs which were kept in his home required the use of discretion. But ascertaining the correct location description of the house is ministerial. While this task might in some extreme circumstances be a discretionary function, it is ministerial when routine and available methods of location description are at the officer's disposal. On the present record, however, the immunity

claim should be easily dismissed as not implicating a discretionary function.

The procedures required by the Warrant Clause may be analyzed in five components: (1) The showing of probabie cause requires setting forth facts regarding the unlawful conduct and its relation to the place to be searched. (2) Apart from the probable cause relationship of the unlawful conduct to the referenced residence, the location of the residence itself must be particularly described. (3) All facts and descriptions can only be shown by sworn statements. (4) These sworn statements must be presented to a judge or judicial officer. (5) The judge or judicial officer must actually issue a warrant containing a particular or individualized description of the location of the residence.

The qualified immunity defense may be asserted only when the conduct under scrutiny is a discretionary, non-ministerial function:

> Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying 'ministerial' tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. *** We therefore hold that government officials performing discretionary functions generally are shielded from liability *** [by qualified immunity]. [Emphasis added].

Harlow v. Fitzgerald, supra at 73 L Ed 2d 409-10. Most officials perform both discretionary and ministerial functions, and these must be distinguished when considering immunity. In Westfall v.

Erwin, 484 US ___, 98 L ed 2d 619, 627, 108 S Ct ___ (1988), the Court explained:

> [P]etitioners contend that *** the requirement is satisfied as long as the official exercises "minimal discretion" If the precise conduct is not mandated by law, petitioners argue, then the act is "discretionary" ***. We reject such a wooden interpretation of the discretionary function requirement. Because virtually all official acts involve some modicum of choice, petitioners' reading of the requirement would render it essentially meaningless.

In order to resolve an officer's claim of immunity, the court should give "consideration of the discretionary nature of the defendant's acts". Saul v. Larsen, 847 F2d 573, 576 (9th Cir. 1988) (remanding tort and constitutional claims to district court to take evidence for this determination). Not all acts of law enforcement officers are of a discretionary nature. Garcia v. U.S., 826 F2d 806, 809 (9th Cir. 1987), Deary v. Evans, 570 F Supp 189, 199 n. 17 (D. Vig. Is. 1983) ("some of their functions are purely routine and ministerial"). As stated in Restatement Law of Torts 2d, Immunities, sec. 895D, comment h, "Ministerial acts:

> If an act of the official involves less in the way of personal decision or judgment ***, there is no immunity or privilege. *** Ministerial acts are those done by officers *** to administer the law with little choice as to when, where, how or under what circumstances their acts are to be done.

While "the details of how best to proceed with the performance of a search" is "generally left to the discretion of the executing officers", Dalia v. United States, 441 US 238, 60 L Ed 2d 177, 192, 99 S Ct 1682 (1979), a simple "execution of an

arrest warrant is a ministerial rather than a discretionary function". Kane v. Anderson, 509 A2d 656, 657 (Me. 1986).

3. The writ should not be granted because the petition for it is based upon an erroneous view that police officers have no duty to investigate under the particularity requirement of the Warrant Clause of the Fourth Amendment.

In Franks v. Delaware, 438 US 154, 57 L Ed 2d 667, 677-78, 98 S Ct. 2674 (1978) the Court noted that the "bulwark of Fourth Amendment protection, of course, is the Warrant Clause". In United States v. Leon, 468 US 897, 82 L Ed 2d 677, 692-93, 104 S Ct 3405 (1984), the Court emphasized that the Warrant Clause "is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'" The Warrant Clause has repeatedly been held to necessarily imply that police seeking search warrants have a "duty to investigate" and ascertain accurate location information.

In United States v. United States District Court, 407 US 297, 32 L Ed 2d 752, 92 S Ct 2125 (1972), the Court reiterated the historical context of the Warrant Clause's relationship to the duty to investigate:

> Though the Fourth Amendment speaks broadly of "unreasonable searches and seizures", the definition of "reasonableness" turns at least in part, on the more specific commands of the warrant clause. *** The warrant clause of the Fourth Amendment is not dead language. Rather, it has been "a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be

> somehow 'weighed' against the claims of police efficiency. It is, or should be, an important part of our machinery of government, operating as a matter of course to check the well-intentioned but mistakenly overzealous *** officers who are a part of any system of law enforcement". [Citations omitted].
> ***
> Lord Manfield's formulation [of over two centuries ago] touches the very heart of the Fourth Amendment directive: that where practical, a government search and seizure should represent both the efforts of the officer to gather evidence *** and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises ***.

Id. at 32 L Ed 2d 765-66. Thus, the duty to investigate is not a perfunctory and independent restriction on police activity; it is a historic and integral component of the Fourth Amendment.

The duty to investigate and ascertain location particularly has more recently been considered by the Court in Maryland v. Garrison, 480 US 79, 94 L Ed2d 72, 80-83, 107 S Ct 1013 (1987). The required degree of particularity of a location description will depend upon the facts available to the police at the time they apply for a warrant, and additional facts learned prior to or during its execution. The Court explained the rationale of this holding:

> The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized."
>
> Plainly, if the officers had known, or even if they should have known [of their mistake],***they would have been obligated to exclude respondent's apartment from the scope of the requested warrant. ***
>
> [T]he validity of the search***pursuant to a warrant authorizing the search***depends on whether the officers' failure to realize the overbreadth of the

> warrant was objectively understandable and reasonable. [Emphasis added].

Based upon the facts found by the Maryland trial court in the suppression hearing, the Court concluded that the search in that case was not offensive to the Warrant Clause. However, the Court conditioned this conclusion on the facts of that case:

> Here [the mistaken search] unquestionably was [objectively understandable and reasonable]. The objective facts available to the officers at the time suggested no distinction [between the two residences]***. [T]he officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment. [Emphasis added].

Based on this reasoning, it is plainly a fact question for a jury to decide what investigation the petitioner undertook, as well as what additional investigative steps were reasonably available to him.

4. The writ should not be granted because the petition for it is based upon an erroneous view that a Section 1983 action under the particularity requirement of the Warrant Clause requires a culpability showing at or above the level of "reckless disregard", rather than "constitutional negligence".

The Fourth Amendment right to be free from unreasonable searches or seizures, in its two century old generality, is the right upon which the Navarros section 1983 action is based. As set forth in Marron v. United States, 275 US 192, 72 L Ed 231, 236 (1927):

> The 4th Amendment declares that the right to be secure against unreasonable searches shall not be violated, and it further declares that "no warrants shall issue

> but upon *** oath or affirmation, and particularly describing the place to be searched ***". General searches have long been deemed to violate fundamental rights *** since they placed "the liberty of every man in the hands of every petty officer".

As more recently stated in Maryland v. Garrison, 480 US 79, 94 L ed 2d 72, 80-81, 107 S Ct 1013 (1987):

> The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the person or things to be seized". The manifest purpose of this particularity requirement was to prevent general searches. [Emphasis added].

The concern of the Framers was not with the particular laws that were to be enforced by this police power, but with its indiscriminate exercise. General warrants were probably quite effective in locating the contraband sought, but at the expense of many "wrong houses" being invaded in the process.

The requirement of particularity serves the obvious end of bringing accuracy to police targeting of the locations intended to be searched. As simply noted in Massachusetts v. Sheppard, 468 US 981, 82 L Ed 2d 737, 743 n.5, 104 S Ct 3424 (1984):

> The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional. [Citations omitted].

Unlike the procedural due process clause of the Fourteenth Amendment, section 1983 claims based on the Fourth Amendment carry no requirement to allege or prove intentional conduct. This Court has yet to determine the threshold showing which plaintiffs must make in Fourth Amendment actions. The question

is open in some circuits, but not in the Ninth. In Borunda v. Richmond, 885 F2d 1384, 1391 (9th Cir. 1988), the court rejected the police position that a prima facia case under section 1983 requires conduct beyond "simple negligence". The court stated that this "argument misperceives the constitutional deprivation alleged", and held that:

> In Daniels v. Williams, 474 US 327 *** (1986) and a companion cases, Davidson v. Cannon, 474 US 344 *** (1986), the Supreme Court held that mere negligence could not constitute a "deprivation" of life, liberty or property under the fourteenth amendment. Contrary to appellant's assertion, this holding has little relevance to a section 1983 action involving fourth amendment rights.

To the same effect is the view of the other circuits. In McKay v Hammock, 730 F.2d 1367, 1373 n. 5 (10th Cir. 1984) the court held:

> Thus, an intent requirement is not part of a section 1983 action unless the action is based on a constitutional provision which itself incorporates an element of scienter.

In Briggs v. Malley, 748 F2d 715, 719-20 (1st Cir. 1984), aff'd 475 US 335, 89 L Ed 2d 271, 106 S Ct 1092, the court exhaustively studied the relationship between substantive Fourth Amendment standards and qualified immunity. In the most direct terms, the court held "constitutional negligence" to be actionable under section 1983:

> The objective reasonableness standard should be understood to prohibit conduct which is "constitutionally negligent". This reading of Harlow is supported by the Supreme Court's holding in Parratt v. Taylor [citation omitted], that negligent deprivations of constitutional rights are actionable under section 1983.

> ***
> This argument [that a negligence standard will chill zealous law enforcement] overlooks the fact that under our system of government, the police have a duty to fight crime without violating constitutional rights. This is difficult at times, but it is what the constitution requires. If we cannot demand of our police officers that they recognize when they do not have the authority to make a search or effect an arrest, then we have given up the very idea of a rule of law. The exercise of police power within the law is the very foundation of the social contract. We should expect police officers to have a basic understanding of the limits of their power and we must hold them liable when, negligently or intentionally, they overstep these bounds. [Emphasis added].

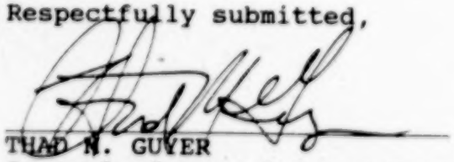
This Court left the foregoing First Circuit holding intact.

Detective McCleary argues that the Navarros can recover only upon meeting a standard of "deliberate falsity" or "reckless disregard" under Franks v. Delaware, 438 US 154, 98 S Ct 2674, 57 L Ed 2d 667, 672 (1978). The sole thrust of the Franks holding was to provide criminal courts with a procedural method for applying the exclusionary rule when a defendant claims that probable cause is based upon an affidavit wrought with knowing or reckless falsehoods, to wit, "judicial deception" cases as the Ninth Circuit call them. To the extent that a civil claim is limited to that scenario, Franks may provide the applicable section 1983 standard for qualified immunity, but not for the substantive Fourth Amendment violation itself. This Court's decision in Franks neither attempted to nor resulted in (1) articulation of overarching civil liability standards for Fourth Amendment violations, nor (2) criminal or civil standards for Fourth Amendment violations not concerned with probable cause.

CONCLUSIONS

The trial judge's order denying summary judgment to Detective McCleary was properly affirmed. Unlike Hunter v. Bryant, 502 U.S. ___, 116 L Ed 2d 589, 112 S. Ct. 534 (1991), this is not a case where the courts below have held that a jury should decide the immunity question. Instead, the Ninth Circuit remanded to the jury disputed fact questions which must be decided before the immunity questions is ultimately resolved. Moreover, there should never be any ultimate grant of qualified immunity because no discretionary function by petitioner is involved. The case should be resolve at trial on a standard of "constitutional negligence" wherein the jury decides whether petitioner reasonably discharged his duty to investigate under the Warrant Clause of the Fourth Amendment.

Respectfully submitted,



THAD M. GUYER
Counsel of Record for Respondents

Other Counsel for Respondents are:

A.E. Gene Piazza and Eugene J. Piazza, of Medford, Oregon.

APPENDIX

T.M. Guyer & Friends
P[illegible]ional Corporation for Law & Advocacy
2[illegible]West Main Street
Med[illegible]rd, Oregon 97501

(503) 773-9656
FAX 770-1277

April 24, 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Francis J. Lorson
Chief Deputy Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

RE: Thomas McCleary v. Jose G. Navarro and Esperanza C. Navarro; U. S. Court of Appeals Docket No. 90-1550

Dear Mr. Lorson:

Please find enclosed for filing with the Court the original and twelve copies of Respondents' Motion to Appear in Forma Pauperis, Affidavit, and Brief in Opposition to Petition for Writ of Certiorari with Appendix. Also enclosed is a Certificate of Service indicating that I have served two copies of the Motion, Affidavit, and Brief upon opposing counsel, Robert E. Franz, Jr., by mailing said documents to them on Friday, April 24, 1992.

Thank you for your courtesies and assistance.

Sincerely yours,

Thad M. Guyer

TMG/jp
Enclosure

cc: Robert E. Franz, Jr.
Jose and Esperanza Navarro

No. 91-1550

In the Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS MCCLEARY,

Petitioner,

V.

JOSE G. NAVARRO AND
ESPERANZA C. NAVARRO,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 29.3., I served a copy of Respondents' Motion to Appear In Forma Pauperis, Affidavit, and Brief in Opposition to Petition for Writ of Certiorari with Appendix on Petitioner, Thomas McCleary, by depositing said copies in the United States Mail in Medford, Oregon, Friday, April 24, 1992, enclosed in a sealed envelope, with postage paid and addressed to his attorney, Robert E. Franz, Jr., P. O. Box 10733, Eugene, Oregon 97440.

THAD M. GUYER OSB #82144
221 West Main Street
Medford, Oregon 97501
Phone (503) 773-9656
Counsel for Respondents

No. 91-_____

In the Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS MCCLEARY,

Petitioner,

V.

JOSE G. NAVARRO AND
ESPERANZA C. NAVARRO,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 29.3., I served three copies of Petitioners' Writ of Certiorari with Appendix on Respondents, Jose G. Navarro and Esperanza C. Navarro, by depositing said copies in the United States mail in Eugene, Oregon, Wednesday, March 25, 1992, enclosed in a sealed envelope, with postage paid and addressed to their attorneys, Eugene Piazza and Thad Guyer, 221 W. Main Street, Suite 1, Medford, Oregon, 97501.

ROBERT E. FRANZ JR. OSB #73091
P.O. Box 10733
Eugene, Oregon 97440
Phone (503) 683-9512
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

THOMAS McCLEARY *v.* JOSE G. NAVARRO ET UX.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91-1550. Decided June 1, 1992

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR and JUSTICE THOMAS join, dissenting.

Respondents filed this lawsuit after police, who were attempting to execute a search warrant, began kicking at their door at 11 o'clock one night. The police were looking for a suspected cocaine dealer, but they got the wrong house. The question presented is whether petitioner, the officer who drafted the search warrant affidavit describing the house to be searched, is entitled to qualified immunity. Because the Court of Appeals applied the wrong legal standard in answering that question, I would reverse and remand for further consideration.

Petitioner, a detective, received a tip from a confidential informant that one Andres Villa had drugs in his home, one of several small houses on an access road to a plant. The first building was set back from the road, along a separate driveway. The informant did not count this structure when he told petitioner that Villa lived in the second house on the right. Consequently, the warrant that petitioner obtained directed officers to go to the second house on the right. The officers executing the warrant counted differently, so they ended up at the wrong house.

Respondents sued petitioner and others not party to this petition under 42 U. S. C. § 1983, alleging a violation of their Fourth Amendment rights. The District Court denied petitioner's motion for summary judgment on grounds of

qualified immunity. The Court of Appeals affirmed, holding "that the question in this case is whether a police officer in [petitioner's] position would reasonably have described the location with sufficient particularity to direct those executing the warrant to the correct house on the right" and "that it is for the jury to decide whether [petitioner] acted reasonably . . . ." *Navarro* v. *Barthel*, 952 F. 2d 331, 333 (1991) (per curiam).

The decision of the Court of Appeals was entered just a few days after our judgment in *Hunter* v. *Bryant*, ___ U. S. ___, ___ (1991), in which we explained that the appropriate inquiry was whether a reasonable officer *could* have thought that he had acted in accordance with the Constitution, and not whether an officer *would* have acted otherwise (the standard applied by Ninth Circuit in *Hunter* and the present case). This distinction provides "ample room for mistaken judgments," because qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U. S. 335, 343, 341 (1986), quoted in *Hunter, supra*, at ___.

In *Hunter* we also reiterated the principle that questions of immunity ordinarily should be decided by the court, not by the jury, *id.*, at ___, because "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability." *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1985). See *Hunter, supra*, at ___ (collecting cases).

Because the Court of Appeals did not have the benefit of our decision in *Hunter* when it was deciding this case, I would summarily reverse and remand so the Ninth Circuit may reexamine its decision in light of the correct legal standards.